

# Democracy falling apart

The Turkish Judiciary in 2018

This book explains the role and function of the basic principles necessary for a democratic state of European character: an independent judiciary, a consistent separation of powers and a commitment to the Rule of Law. It lays out the significant binding international legal provisions as well as the generally accepted international standards. Eventually, by depicting the current developments in Turkey, it shows how quickly a democracy can collapse if these foundations are not protected.



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Thomas Stadelmann

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Thomas Stadelmann (Editor)

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Role and Function of Judicial  
Independence, Separation of Powers  
and the Rule of Law in a  
Constitutional Democracy

Supported by



The Turkish Judiciary in 2018

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Powers and the Rule of Law in a Constitutional Democracy –  
The Turkish Judiciary in 2018



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**Role and Function of Judicial Independence,  
Separation of Powers and the Rule of Law in a  
Constitutional Democracy – The Turkish  
Judiciary in 2018**



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This book is supported by the European Association of Judges (EAJ), a regional Group of IAJ, the International Association of Judges. Today it has 44 national associations as members. For further Information: <http://www.iaj-uim.org/regional-groups/>



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*“The truth is like a lion;  
you don't have to defend it.  
Let it loose; it will defend itself.”*

*Attr.: Augustine of Hippo*





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## 1. Introduction/Introduction/Einleitung/Giriş

### Introduction

The European Association of Judges (EAJ) has been dealing with the situation of justice and the rule of law in Europe for years. It notes with great concern that the independence of justice, the separation of powers and the rule of law can no longer be taken for granted: the commitment to these essential foundations for the democratic rule of law is therefore becoming increasingly important.

An example of this negative evolution - unique in these proportions in the current century - is the radical change of Turkey's democracy. The conditions in this country have been worrying the EAJ for a long time. Not only has the independence of justice been virtually eliminated, but there is no longer any question of the separation of powers.

The independence of justice has indeed been under pressure for some time and since the coup attempt of July 15, 2016, the situation is only getting worse. Thus, the foundations of a democracy have been largely suspended.

This book aims to reiterate, once again, the essential elements for the maintenance of a democracy based on the rule of law and to show how quickly a democracy can collapse if these foundations are not protected.

The contributions of this book come from two different types of authors. Firstly, from judges from all over Europe who have been operating within the EAJ and other European organizations for many years for the preservation of rule of law, the separation of powers and an independent judiciary. Secondly, from jurists from Turkey who report first-hand the development of the situation in their country. The Turkish writers each write under a pseudonym since they can not risk, under present conditions, to openly criticize what has become of the rule of law. This fact in itself is already highly significant in the context of the topic.

The contributions are addressed to lawyers, politicians, but also to all other readers interested in the rule of law, democracy based on the separation of powers and the independence of the judiciary. This book is multilingual, the contributions are written in English, German or French. They each contain a short summary in English, German, French and Turkish. The Turkish laws were available to the Turkish authors, the other authors used the English translations.

*Thomas Stadelmann, editor*

## Introduction

L'Association Européenne des Magistrats (AEM) s'occupe depuis des années de la situation de la justice et de l'Etat de droit en Europe. Il note avec une grande préoccupation que l'indépendance de la justice, la séparation des pouvoirs et l'Etat de droit ne sont plus considérés comme allant de soi: l'engagement pour ces fondements indispensables à l'Etat de droit démocratique devient donc de plus en plus important.

Un exemple de cette évolution négative - unique dans ces proportions au cours de ce siècle - sont les événements survenus en Turquie. Les conditions dans ce pays inquiètent l'AEM depuis longtemps.

En effet, l'indépendance de la justice y est sous pression depuis un certain temps et, à la suite de la tentative de coup d'État du 15 juillet 2016, la situation ne cesse de s'aggraver. Non seulement l'indépendance de la justice a été pratiquement éliminée, mais en plus il n'y est plus question de séparation des pouvoirs. Ainsi, les fondements d'une démocratie ont été largement suspendus.

Ce livre a pour objectif de rappeler, une fois de plus, les éléments indispensables au maintien d'une démocratie fondée sur l'Etat de droit et de montrer à quelle vitesse une démocratie peut s'effondrer si ces fondements ne sont pas protégés.

Les contributions de cet ouvrage proviennent de juges de toute l'Europe oeuvrant au sein de l'AEM et d'autres organisations européennes depuis de nombreuses années pour la primauté du droit, la séparation des pouvoirs et une justice indépendante ainsi que de juristes de Turquie qui rapportent de première main le développement de la situation dans leur pays. Les auteurs turcs écrivent chacun sous un pseudonyme puisque dans les conditions actuelles, ils ne peuvent se permettre de critiquer ouvertement ce qui est advenu de l'Etat de droit. Ce fait en soi est déjà hautement significatif dans le contexte du sujet traité.

Les contributions s'adressent aux juristes, aux politiciens, mais aussi à tous les autres lecteurs intéressés par de l'État de droit, la démocratie fondée sur la séparation des pouvoirs et l'indépendance de la justice. Ce livre est multilingue, les contributions sont en anglais, en allemand ou en français. Chacune est précédée d'un bref résumé en anglais, en français, en allemand et en turc.

Les lois turques étaient à la disposition des auteurs turcs, les autres auteurs se sont basés sur les traductions anglaises.

*Thomas Stadelmann, éditeur*

## Einleitung

Die Europäische Richtervereinigung – EAJ – beschäftigt sich seit Jahren mit der Situation der Justiz und des Rechtsstaates in Europa. Sie stellt mit grosser Sorge fest, dass die Unabhängigkeit der Justiz, die Gewaltenteilung und die Rule of Law in vielen Ländern keine Selbstverständlichkeit mehr sind: Der Einsatz für diese unverzichtbaren Grundlagen des demokratischen Rechtsstaates wird deshalb immer wichtiger.

Ein Beispiel für diese negative Entwicklung – in ihrem Ausmass in diesem Jahrhundert einmalig – sind die Geschehnisse in der Türkei. Mit den dortigen Verhältnissen befasst sich die EAJ schon länger: Seit geraumer Zeit ist die Unabhängigkeit der Justiz unter Druck und nach dem Putschversuch vom 15. Juli 2016 spitzte sich die Situation fortlaufend zu. Nicht nur die Richterliche Unabhängigkeit wurde praktisch beseitigt, auch von Gewaltenteilung kann nicht mehr die Rede sein. Damit wurden die Grundlagen einer rechtsstaatlichen Demokratie weitgehend ausser Kraft gesetzt.

Vor diesem Hintergrund wurde dieses Buch geschrieben: Es soll – einmal mehr – daran erinnern, was es für die Aufrechterhaltung eines demokratischen Rechtsstaates braucht, und wie schnell eine Demokratie untergehen kann, wenn diese Grundlagen nicht geschützt werden.

Die Beiträge im Buch stammen von Richterinnen und Richtern aus ganz Europa, welche sich innerhalb der EAJ und in weiteren Europäischen Gremien seit vielen Jahren für den Rechtsstaat, Gewaltenteilung und eine unabhängige Justiz einsetzen, und von Juristinnen und Juristen aus der Türkei, welche über die Entwicklung in ihrem Land aus erster Hand berichten. Die Autoren aus der Türkei schreiben jeweils unter einem Pseudonym: Unter den heutigen Bedingungen können sie es nicht wagen, unter ihrem Namen offen Kritik an der rechtsstaatlichen Situation zu äussern. Bereits dieser Umstand alleine ist eine wichtige Aussage im Kontext des behandelten Themas.

Die Beiträge wenden sich an Juristinnen und Juristen, Politikerinnen und Politiker, aber auch an alle anderen an Rechtsstaatlichkeit, gewaltenteiliger Demokratie und unabhängiger Justiz interessierte Leserinnen und Leser. Das Buch ist Vielsprachig: Die Beiträge sind auf Englisch, Deutsch oder Französisch geschrieben; sie enthalten je eine Kurzzusammenfassung in Englisch, Französisch, Deutsch und Türkisch. Die türkischen Gesetze standen den türkischen Autoren zur Verfügung, die übrigen Autoren stützen sich auf die englischen Übersetzungen ab.

*Thomas Stadelmann, Herausgeber*

## Giriş

Avrupa'daki demokratik anayasal sistemlerde yargının bağımsızlığı, kuvvetler ayrığı ve hukukun üstünlüğü ilkeleri vazgeçilmezdir. Bu kitap, bu temel ilkeleri açıklamakta, bağlayıcı nitelikteki uluslararası hükümleri ve genel kabul görmüş uluslararası standartları (bağlayıcı olmayan hükümler) ortaya koymaktadır. Bu ilkeler devamında Türkiye'nin güncel durumu örnek alınarak ayrıntılı olarak tartışılmaktadır:

Temmuz 2016'daki olaylardan önce Türkiye'de, yargının bağımsızlığı ve hukukun üstünlüğü prensipleri ne şekilde uygulanmaktaydı? Çıkarılan olağanüstü hal kanun hükmünde kararnamelelerinin demokratik düzenlerde anlamı nedir? 2017 anayasa değişikliği referandumunu nasıl anlamalıyız? Ayrıca bu bölümde hukuki normlar; hukukun üstünlüğü, yargı bağımsızlığı ve kuvvetler ayrılığı ilkeleri çerçevesinde incelenecektir.

Kitabın bir diğer kısmında ise, Türkiye'deki mevcut durum, Avrupa Yargıçlar Birliği'nin bakış açısıyla ele alınmış ve özellikle örgüt suçuna istinaden yapılan insanlık dışı cezalandırmalar, basın ve ifade özgürlüğünün kısıtlanması ve tutukluluk koşulları değerlendirilmiştir. Ayrıca yapılan hukuksuz uygulamalar karşısında gerek Türkiye'de başvurulabilecek mercilere gerekse AİHM'ye değinilmiştir.

Bu yazılarla avukatlara, politikacılara ve aynı zamanda hukukun üstünlüğüne, kuvvetler ayrılığını içeren bir demokrasiye ve yargı bağımsızlığına inanan tüm diğer okurlara seslenilmiştir. Kitabın bölümlerini oluşturan yazılar, Avrupa'daki çeşitli hakimler ve bazı Türk hukukçular tarafından kaleme alınmıştır. Bu yazılarla; avukatlara, politikacılara ve aynı zamanda gerek Avrupa'daki- Türkiye de dahil olmak üzere – gerekse diğer kıtalardaki hukukun üstünlüğüne, kuvvetler ayrılığını içeren bir demokrasiye ve yargı bağımsızlığına inanan tüm diğer okurlara seslenilmiştir. Yazılar İngilizce, Almanca veya Fransızca olarak yazılmıştır ve her bir yazının İngilizce, Fransızca, Almanca ve Türkçe olmak üzere kısa bir özeti bulunmaktadır.

*Thomas Stadelmann, Editör*

---

## 22. List of Authors

|                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |        |
|----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
| Akdeniz Ali Ekrem    | Pseudonym                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 13     |
| Arslan Levent        | Pseudonym                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 12, 18 |
| Arslan Murat         | Murat Arslan is a Turkish judge and was the President of the Judges and Prosecutors Union (YARSAV) until this association was forbidden and dissolved. On 26 October 2016, he was arrested. He awarded the Václav Havel Human Rights Prize 2017 at the Parliamentary Assembly of the Council of Europe.                                                                                                                                                                                                                                                                                                                                                               | 21     |
| Çetin Ahmet          | Pseudonym                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | 17, 18 |
| Edwards John         | The Hon Mr Justice John Edwards, Judge of the Court of Appeal of Ireland since 2014, previously Judge of the High Court of Ireland 2007-2014. President of the Association of Judges of Ireland, Vice President of the Second Study Commission of the International Association of Judges, Member of the European Association of Judges (EAJ) Working Group on the Situation of Member Associations”, and also the EAJ’s “Ways to Brussels Working Group”.                                                                                                                                                                                                            | 9      |
| Engstad Nils Asbjorn | Nils Engstad is a judge at Hålogaland Court of Appeal, Norway, and he is on part time basis President of the Finnmark Land Tribunal. Engstad has been a member of the Council of Europe’s Consultative Council of European Judges (CCJE) since 2004, and he was the President of the Council in 2016 and 2017. Engstad is a former President of the Norwegian Association of Judges. Prior to his appointment as a judge in 2000, Engstad worked as a private practicing lawyer. He has also been head of department at the Norwegian Polar Institute, State Secretary at the Norwegian Ministry of Justice and adviser to the Norwegian Minister of Foreign Affairs. | 2      |

|                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |      |
|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| Gass Stephan      | Stephan Gass is a Vice-President at the Court of Appeal (Kantonsgericht) of Basel-Landschaft, Switzerland. He is the Chair of the EAJ-Working Group “On the Situation of Member Associations” and was a former president of the Swiss Judges Association.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 5, 7 |
| Igreja Matos José | José Igreja Matos is a Judge since 1990 currently appointed as Court of Appeal’s Judge in Oporto, Portugal. He is one of the Vice-Presidents of the International Association of Judges and the President of the European Association of Judges. Member of the first Advisory Board of the Global Judicial Integrity Network of United Nations. Expert for CoE, EU, IBA and other international organizations in themes related with the judiciary. Author and co-author of several books and articles about Judicial Management, Civil Law and Civil Procedure, Judicial Ethics, Judicial Integrity and Human Rights. Director of the publication “Julgar” (Legal Journal) – 2012/2016. Lecturer in more than twenty countries in Europe, Africa and Latin America in subjects related with the Judiciary or Human Rights. Coordinator on University Master Courses in Universidade de Coimbra, Portugal | 14   |
| Kaptein Angela    | Angela Kaptein is a Senior judge at the Court of Appeal in The Hague, Netherlands, president of the International Commission of the Dutch Association of judges and public prosecutors (NVvR), member of the 3d Study Commission of the International Association of Judges.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              | 15   |
| Oberto Giacomo    | Giacomo Oberto has been a judge at the Civil Court of Turin since 1984, where he dealt with civil and commercial law cases. In 1988 he received a doctorate in private law. In 1997 he became a judge of the Court of Appeal and in 2004 a judge of the                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | 3    |

Supreme Court of Cassation. Between 1980 and 1992 he was a voluntary assistant lecturer at the Turin Faculty of Law. In 1992 he was appointed by the Turin Faculty to a professorship in civil law. Between 1994 and 1996 he was involved in organising legal (initial and continuous) training of judges within the framework of the Italian High Council for the Judiciary in Rome. From 2001 to 2009 he has been member of the Steering Committee of the Turin School of Specialisation for Legal Professions. In 1991 Dr. Giacomo Oberto was appointed as the Italian delegate to the 2nd Study Commission of the International Association of Judges. From 1994 to 2012 he was Deputy Secretary-General of the International Association of Judges (I.A.J.). On 14 November 2012 he was elected as Secretary-General of the I.A.J. He has taken part, since 1995, as an expert of the Council of Europe, in many of the activities in the field of legal co-operation and advice with the Countries of Central and Eastern Europe. In 2009 he was appointed as a member of the Commission charged to draft the Recommendation CM/Rec (2010) 12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities. Since 2007 he has been a member of the “SATURN Steering Committee” of the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe. On 2 March 2017 he was elected President of the above mentioned “SATURN Steering Committee.”

|                |                                                                                                                             |    |
|----------------|-----------------------------------------------------------------------------------------------------------------------------|----|
| Öztürk Mehmet  | Pseudonym                                                                                                                   | 6  |
| Petry Roswitha | Roswitha Petry, PhD in migration law, currently works as a legal officer in the II. Public Law Department of the Swiss Fed- | 10 |



|                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |    |
|--------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----|
|                    | eral Supreme Court. She is also a lecturer at the University of Geneva and the Geneva Bar School. In March 2018 she was elected judge of the Swiss Federal Administrative Court in St. Gallen and will take office in December 2018.                                                                                                                                                                                                                                                                                                                                                                                                                      |    |
| Regnard Christophe | Christophe Regnard était nommé en 1996 substitut du Procureur de la République du Mans, il effectuera ensuite sa carrière comme juge, puis vice-président dans les tribunaux de Pontoise, Versailles et Nanterre. Il exerce depuis 2014 les fonctions de conseiller à la cour d'appel de Paris. Président de l'Union Syndicale des magistrats (USM), la première organisation de magistrats en France, de 2008 à 2014, il est élu président de l'Association Européenne des Magistrats en 2012. Il est depuis octobre 2016 président de l'Union Internationale des Magistrats. Il est membre du Conseil Supérieur de la Magistrature depuis février 2015. | 16 |
| Alp Tarkan         | Pseudonym                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 20 |
| Sayar Atılgan      | Pseudonym                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | 8  |
| Schneiderhan Peter | Peter Schneiderhan is a Senior Prosecutor at the Prosecution Office of Stuttgart, Member of the board of the German Judges association (DRB) , Chairman of the European association of judges (EAJ) working group "ways to Brussel", Member of the European Association of Judges (EAJ) "Working Group on the Situation of Member Associations".                                                                                                                                                                                                                                                                                                          | 19 |
| Sessa Duro         | Duro Sessa is the President of Supreme Court of Republic of Croatia since July 2017. Currently president of CCJE and one of the vice-presidents of IAJ. He was elected as judge of the Supreme Court in 2008 and before that he was performing judicial functions at first and appellate level of the                                                                                                                                                                                                                                                                                                                                                     | 4  |

|                   |                                                                                                                                                                                                                                                                                                                    |        |
|-------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|
|                   | Croatian judiciary. From 2005 to 2017 he was the President of Association of Croatian Judges and one of the founders of the Association.                                                                                                                                                                           |        |
| Stadelmann Thomas | Thomas Stadelmann is a Justice at the Swiss Supreme Court, Member of the board of the Swiss Judges Association, Vice-president of the 1st Study Commission of the International Association of Judges, Member of the European Association of Judges (EAJ) “Working Group on the Situation of Member Associations”. | 1, 119 |